August 22, 2008

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Darryl White**
Tax Registry No. 918472
23 Precinct
Disciplinary Case No. 81524/06

The above named member of the service appeared before Assistant Deputy Commissioner David S. Weisel on November 27, 2007 and was charged with the following:

DISCIPLINARY CASE NO. 81524/06

1. Said Police Officer Darryl White, assigned to the 23rd Precinct, while off-duty, at or about 0039 hours, on December 4, 2005, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: in the vicinity of Metropolitan Avenue and Lefferts Boulevard, in Queens County, did wrongfully operate a motor vehicle while under the influence of an intoxicant.
P.G. 203-10, Page 1, Paragraph 5 PROHIBITED CONDUCT
NYS VTL Section 1192(3) OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE

2. Said Police Officer Darryl White, assigned as indicated in Specification #1, while off-duty, on the date, time and location indicated in Specification #1, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: did wrongfully operate a motor vehicle while his ability was impaired by an intoxicant.
P.G. 203-10, Page 1, Paragraph 5 PROHIBITED CONDUCT
NYS VTL Section 1192(1) OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE

3. Said Police Officer Darryl White, assigned as indicated in Specification #1, while off-duty, December 4, 2005, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: having been arrested for Driving While Intoxicated, said Officer refused to submit to a Chemical Test.
P.G. 203-10, Page 1, Paragraph 5 PROHIBITED CONDUCT

4. Said Police Officer Darryl White, assigned as indicated in Specification #1, while off-duty, on the dated indicated in Specification #1, did wrongfully consume an intoxicant to the extent that said Officer was unfit for duty.
P.G. 203-04, Page 1, Paragraph 1 FITNESS FOR DUTY

5. Said Police Officer Darryl White, assigned as indicated in Specification #1, while off-duty, on the date indicated in Specification #1, was unfit for duty while armed.
P.G. 203-04, Page 1, Additional Data **FITNESS FOR DUTY**

6. Said Police Officer Darryl White, assigned as indicated in Specification #1, while off-duty, on the date, time and location indicated in Specification #1, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Police Officer engaged in a verbal and physical altercation in a public place with an individual known to this Department which escalated in a police incident. (As amended)
P.G. 203-10, Page 1, Paragraph 5 **PROHIBITED CONDUCT**

7. Said Police Officer Darryl White, assigned as indicated in Specification #1, while off-duty, on the date, time and location indicated in Specification #1, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Police Officer White inappropriately unholstered his gun and displayed it to persons known to this Department, causing said individuals to feel intimidated and/or threatened . (As amended)
P.G. 203-10, Page 1, Paragraph 5 **PROHIBITED CONDUCT**

8. Said Police Officer Darryl White, assigned as indicated in Specification #1, while off-duty, on the date indicated in Specification #1, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: was unfit for duty while armed and unholstered his firearm and displayed it to person known to this Department. (As amended)
P.G. 203-10, Page 1, Paragraph 5 **PROHIBITED CONDUCT**

In a Memorandum dated February 29, 2008, Assistant Deputy Commissioner Weisel accepted the Respondent's PLEADING GUILTY to Specification Nos. 1, 2, 3, 4 and 5, found the Respondent GUILTY of Specification No. 8, and found the Respondent NOT GUILTY of Specification Nos. 6 and 7.

Having read the Memorandum and analyzed the facts of these instant matters, I approve the findings, but disapprove the recommended penalty. The Respondent has been found guilty of consuming an intoxicant to the extent of becoming unfit for duty, also while armed, and his ability to operate a motor vehicle was impaired.

It is therefore directed that in addition to Assistant Deputy Commissioner Weisel's recommended penalty of 30 Suspension days already served, 15 Vacation days, and One-Year Dismissal Probation, Respondent White is to also be subject to the parameters and provisions of I.O. #9-2002/Ordered-Breath testing, during said dismissal probation period.

Raymond W. Kelly
Police Commissioner

The City of New York

POLICE DEPARTMENT

February 29, 2008

MEMORANDUM FOR: POLICE COMMMISSIONER

Re: Police Officer Darryl White
Tax Registry No. 918472
23 Precinct
Disciplinary Case No. 81524/06

The above-named member of the Department appeared before me on November 27 and 28, 2007, charged with the following:

1. Said Police Officer Darryl White, assigned to the 23rd Precinct, while off-duty, at or about 0039 hours, on December 4, 2005, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: in the vicinity of Metropolitan Avenue and Lefferts Boulevard, in Queens County, did wrongfully operate a motor vehicle while under the influence of an intoxicant.

P.G. 203-10, Page 1, Paragraph 5 - PROHIBITED CONDUCT
NYS VTL Section 1192(3) - OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE

2. Said Police Officer Darryl White, assigned as indicated in Specification #1, while off-duty, on the date, time and location indicated in Specification #1, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: did wrongfully operate a motor vehicle while his ability was impaired by an intoxicant.

P.G. 203-10, Page 1, Paragraph 5 - PROHIBITED CONDUCT
NYS VTL Section 1192(1) - OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE

3. Said Police Officer Darryl White, assigned as indicated in Specification #1, while off-duty, December 4, 2005, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: having been arrested for Driving While Intoxicated, said Officer refused to submit to a Chemical Test.

P.G. 203-10, Page 1, Paragraph 5 - PROHIBITED CONDUCT

4. Said Police Officer Darryl White, assigned as indicated in Specification #1, while off-duty, on the date indicated in Specification #1, did wrongfully consume an intoxicant to the extent that said Officer was unfit for duty.

P.G. 203-04, Page 1, Paragraph 1 - FITNESS FOR DUTY

5. Said Police Officer Darryl White, assigned as indicated in Specification #1, while off-duty, on the date indicated in Specification #1, was unfit for duty while armed.

P.G. 203-04, Page 1, Additional Data - FITNESS FOR DUTY

6. Said Police Officer Darryl White, assigned as indicated in Specification #1, while off-duty, on the date, time and location indicated in Specification #1, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Police Officer engaged in a verbal and physical altercation in a public place with an individual known to this Department which escalated in a police incident. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 - PROHIBITED CONDUCT

7. Said Police Officer Darryl White, assigned as indicated in Specification #1, while off-duty, on the date, time and location indicated in Specification #1, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Police Officer White inappropriately unholstered his gun and displayed it to persons known to this Department, causing said individuals to feel intimidated and/or threatened. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 - PROHIBITED CONDUCT

8. Said Police Officer Darryl White, assigned as indicated in Specification #1, while off-duty, on the date indicated in Specification #1, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: was unfit for duty while armed and unholstered his firearm and displayed it to persons known to this Department. *(As amended)*

P.G. 203-10, Page 1, Paragraph 5 - PROHIBITED CONDUCT

The Department was represented by Penny Bluford-Garrett, Esq., and Daniel Maurer, Esq., Department Advocate's Office, and the Respondent was represented by John Tynan, Esq.

The Respondent, through his counsel, entered a plea of Guilty to Specifications 1 through 5 and testified in mitigation of the penalty. The Respondent, through his counsel, entered a plea of Not Guilty to Specifications 6 through 8. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Having pleaded Guilty to Specifications 1 through 5, the Respondent is found Guilty of those Specifications. The Respondent is found Not Guilty of Specifications 6 and 7, and Guilty of Specification 8.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Curt Henry, Aaron Surry, Brian Muszel, Lieutenant William Brady, and Sergeant Roger Coleman as witnesses.

Curt Henry

Henry was an account executive with DTEKS Business Systems and had a bachelor's degree in marketing from St. John's University. He graduated in May 2002. Henry testified that he was 6'3" in height and weighed 305 pounds. He did not recall

whether he was "bigger" or "smaller" in December 2005, but it was "[p]robably the same."

Henry testified that on December 5, 2005,[1] between 12:00 and 12:30 a.m., he was traveling north on Lefferts Boulevard, approaching Metropolitan Avenue, in Queens County. He was heading home, driving a red Dodge Caravan with two passengers, Aaron Surry and Brian Muszel.

Earlier, Henry had been at a friend's house on Lefferts Boulevard. He did not remember when he got to his friend's home. Henry testified that other people at his friend's house left the same time he did. He did not recall how long he had been driving before the accident, but stated that his friend's apartment was about three blocks away from the site of the collision. He did not remember how fast he was driving.

Henry admitted that he was drinking at his friend's house before the accident. After his recollection was refreshed with a report from the Internal Affairs Bureau, Henry testified that he drank two beers and a shot of Hennessy.

Henry observed a car driven by the Respondent make a right turn onto Lefferts Boulevard from Metropolitan Avenue, in the opposite direction, and cross the double yellow line. Henry swerved out of the way, but collided with the Respondent's vehicle. The accident took place on Lefferts, south of the intersection. Henry stopped his car next to the curb, on the same directional side of the road that he was driving, on the corner preceding the intersection. The Respondent also stopped his car on Lefferts. Henry did not recall whether Lefferts Boulevard was wide or narrow at that spot. He did not recall how far away his vehicle was from the Respondent's once they stopped.

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[1] The Specifications place the incident as having occurred on December 4, 2005, in the early morning hours.

After the accident, Henry and his passengers got out of the car. He observed that the bumper of his vehicle was hanging off, and the rear driver side "tire wall" was damaged. Henry testified that the Respondent appeared to be drunk, and contended that his eyes were red, his speech was slurred, and he stumbled as he left his vehicle. The Respondent was wearing a tuxedo.

Henry admitted that he was "pretty upset at the time" because the minivan actually belonged to his uncle, and demanded of the Respondent, "What are you doing? Are you drunk?" Henry also stated that he and the Respondent "exchanged words," and that the Respondent was cursing. Henry asserted that he stayed next to his vehicle. Henry did not recall saying anything more to the Respondent. He did not remember the Respondent making any statements. The Respondent did not identify himself as a member of the Department.

Henry testified that a police "squad car" arrived. He believed that the Respondent approached the car and spoke with the driver. Henry also spoke to the police car's driver, and the vehicle left. He did not remember how long the police vehicle was there. He believed that Lieutenant Brady was driving the car, and that he was with his partner, Police Officer Rojas.

Henry stated that he was on the northbound side of Lefferts Boulevard, and the Respondent was on the opposite side with the police vehicle.

Henry's three other friends arrived after the first police car left. His friends arrived after Muszel called one of them, [redacted] and told them there had been an accident. Muszel also called 911.

Henry admitted that all five of his friends were arguing and "exchanging words" with the Respondent. As Henry went to get the Respondent's license plate number, the Respondent fell to the ground, and then started throwing punches at Surry. Henry contended that Surry was attempting to push the Respondent off and avoid getting struck. He denied that Surry swung at the Respondent.

Henry contended that the Respondent pulled out a black gun and pointed it at Surry's face. Henry felt "scared" and "terrified" when he saw this. The Respondent said, "You don't know who you're fucking with," and began pointing the gun "at everyone. That's when we all like scattered."

Henry testified that one or two additional police cars arrived. He did not remember whether he, his friends, and the Respondent were all standing together when these police vehicles came. He had "no idea" how long it took these police vehicles to arrive after the first police car had left.

Brady also came the second time. Henry thought Brady was going to take the Respondent into custody. The Respondent was "kind of being . . . aggressive, resistant towards Brady, telling him to get the fuck off of him, things like that." Henry stated that the Respondent was not placed under arrest, but he was taken away in the back seat of a patrol car.

A short time after the police vehicles arrived, Henry was taken into custody and brought to the precinct, but was not handcuffed. Henry's five friends were allowed to follow the car Henry was in back to the precinct.

Henry believed he was under arrest once he was asked to take a breathalyzer test. Henry stated that he passed the breathalyzer and his arrest was voided. He did not recall

that his blood alcohol content reading was .038, stating that the incident was two years prior.

Henry denied taking the Respondent's cell phone. He believed he saw the Respondent with a cell phone when the Respondent first got out of the vehicle, but denied observing it "after" the Respondent "came out" of the vehicle. He did not see the Respondent throw or place the phone in the bushes alongside the road.

Henry testified that he first learned the Respondent was a Police Officer when they got to the stationhouse. Henry stated that he observed the Respondent in a room at the precinct. Henry testified that he called his father, a retired member of the Department, from the precinct. He denied asking his father to call anyone, and denied that his father called the Internal Affairs Bureau. Henry testified that he was interviewed by IAB that morning. He was released from the precinct in the afternoon.

Henry admitted that he currently had a pending civil action against the City of New York for damages relating to this incident (CX-1). He had "no idea" of the amount he was seeking, noting that his discussion with his attorney on that fact was two years prior. Henry was not employed at the time of the accident.

Aaron Surry

Surry was a residence manager for two non-profit agencies, and was responsible for helping developmentally disabled adults with their daily affairs. He had a bachelor's degree in sociology and education from Wheaton College in Massachusetts. He was pursuing a master's degree in special education from Touro College. Surry was 6'3" and

weighed "give or take five or ten pounds" between 230 and 240 pounds. He agreed that he was less muscular than Henry.

Surry testified that on December 4, 2005, at approximately 12:30 a.m., in the area of Metropolitan Avenue and Lefferts Boulevard, in Kew Gardens, he was traveling north in a van on Lefferts Boulevard. Surry was in the car with Henry, who was driving, and Muszel. Surry testified that they were heading home, not to a club in Manhattan.

Surry stated that he had been at the home of the girlfriend of a friend, watching a boxing match with several other friends. The home was on Lefferts Boulevard, perhaps a couple of blocks away from Metropolitan Avenue. Surry drank one bottle of beer, possibly two, and others were drinking Hennessy. Henry was drinking as well, but did not appear intoxicated. Surry denied that his group brought Hennessy in the car, and did not remember being told by an assistant district attorney (ADA) that a Hennessy bottle was found in the bushes next to where their car had been.

Surry testified that a southbound car driven by the Respondent swerved into Surry's lane, and the two vehicles collided. Surry contended that he got out of the vehicle to inspect the damage, and that the Respondent "came out, stumbling." He either dropped something or something fell.

Surry stated that "everyone was pretty upset" as a result of the accident. Surry believed Henry went over toward the middle of the street, to speak to the Respondent. Henry spoke to the Respondent "because obviously, you know, a car accident, the drivers are going to talk to one another." Surry did not remember if Henry was yelling, but he was upset, as "[a]nyone would be." Surry was upset also. The Respondent stayed by his

car, and Surry stayed by Henry's car. Surry did not recall how far away he was from the Respondent.

The rear bumper of Henry's car "was completely off, hanging on one side." The Respondent's front left fender "was completely damaged." Surry did not remember how far Henry's vehicle was stopped from the Respondent's car. Henry's car was parked at the curb. There were buildings on the side, but Surry did not remember any bushes.

After "[a] couple of minutes, probably," a patrol car came slowly southbound on Lefferts Boulevard, without its turret lights on. It came to the side of the street where the Respondent's vehicle had stopped. Surry testified that the Respondent said to the male white officer, who was driving the police car, "Code 53," and "it was under control." The use of "Code 53" made Surry believe the Respondent was a police officer, but he never identified himself as such.

Although he wanted to, Surry did not have an opportunity to speak to the officers. Surry claimed that the officers "didn't bother to listen to what we said at the time." One of the officers said, "Someone will be coming back shortly," and told Surry to stand there and wait. The officers left.

Surry's other friends, from the apartment, arrived after the accident after either Henry or Muszel called them.

Surry stated that the Respondent came to "our side of the street" and took down the license plate number. The Respondent "was saying pretty much we were done for, 'You've had it.'" Surry admitted that the Respondent was not yelling, and that there was no aggressive verbal altercation. However, the Respondent was "sort of belligerent," and "[p]ossibly intoxicated." He was also slightly slurring his speech. Surry claimed that he

approached the Respondent and tried to speak to him, in order to calm him down and wait until the other officers came.

Surry claimed that the Respondent "swung at me and fell." He did not trip, but "just swung and fell." The Respondent struck Surry several times in the face. Surry had his hands up in self-defense.

After hitting him, the Respondent backed up and pulled out a black gun, possibly a Glock, and "pointed it directly to my face first." The Respondent was about one or two feet away from Surry. The Respondent "pretty much" told Surry "not to fuck with him" and that "I don't know who I'm fucking with." Then the Respondent "swung around to everybody else." The others were "just in the street, not near" the Respondent.

Surry was afraid when the Respondent pointed the gun at him. Surry testified that he was on the sidewalk, near Henry's minivan, when the Respondent pointed the gun at him. He had no knowledge that any of his friends called 911. Surry did not call 911 because "I had already been hit, I was just in shock as to what happened."

Surry testified that the Respondent was not surrounded when he took out the gun. Surry denied swinging at or punching the Respondent.

Surry testified that perhaps a few minutes later, additional officers arrived. The Respondent crossed the street to speak to the officers. The officers "were telling all of us to go back to the precinct, to give statements."

Surry went to the precinct, where he sat in a room and was asked questions. He did not recall how long he had been at the scene "before the police took [him] away." Surry also saw the Respondent at the precinct. Surry asserted that he suffered a little bruising as a result of the Respondent striking him. Photographs were taken by IAB, but,

Surry commented, the bruising was not visible. After about 45 minutes to an hour of questioning by IAB at the precinct, Surry went to [redacted] Hospital upon IAB's offer. He was taken there by Emergency Medical Services.

Surry was at the hospital for three to four hours. He was not in police custody. He was examined at the hospital and was supposed to have X-rays taken. He wanted to be treated, but his friends called and told him that IAB wanted him to return to the precinct to answer questions and give a statement, so he "had to go back."[2] He went back on his own; he did not believe a member of the Department took him. Surry did not return to the hospital, noting, "Just for bruising and swelling, there was nothing." Surry returned to the precinct in the early morning, and finally left in the early afternoon. The police never told Surry he could not leave the precinct.

Surry admitted that he was a plaintiff in a civil action for damages against the City in connection with the incident.

Surry did not recall seeing the Respondent with a cell phone, or grabbing anything from him. He did not remember the ADA saying that a phone was found in the bushes, or that witnesses that called 911 saw either Surry or Henry throw the phone into the bushes. He did not see anyone make a phone call.

Brian Muszel

Muszel, a title researcher, was set to graduate from Queens College in one month with a bachelor's degree in media. He had been friends with Henry and Surry for over ten years. He was almost 30 years old, between 6'2" and 6'3" in height, and weighed around 205 pounds.

[2] Originally, Surry testified that IAB called him.

Muszel testified that on December 4, 2005, at approximately 12:30 a.m., he was the front passenger in a minivan driven by Henry on Lefferts Boulevard, Queens County, in the area of Metropolitan Avenue. Surry was seated behind Muszel.

Muszel stated that a car driven by the Respondent, seemingly out of control, made a sharp turn from Metropolitan Avenue onto Lefferts Boulevard. Henry attempted to swerve out of the way, but the Respondent's vehicle struck the rear of Henry's car.

Muszel called 911, and Henry and Surry got out of the car. Muszel testified that Henry "asked" the Respondent "out of the car." The Respondent, who appeared intoxicated, dropped his keys, or appeared to do so, "and he just couldn't find them anywhere." The Respondent was stumbling, and mumbling his words. Muszel admitted that he was laughing during the 911 call because when the Respondent fell, "It was more like, oh my God, look at this guy." He characterized his response as perhaps "a nervous laugh."

Henry asked the Respondent, "What, are you drunk?" The Respondent was yelling, and Henry told him, "Relax. What's your problem?" The Respondent answered, "You don't know who you're fucking with."

Muszel testified that a Patrol Supervisor vehicle, driven by Brady, with Rojas in the passenger seat, approached after turning onto Lefferts Boulevard from Metropolitan Avenue. Muszel flagged the car down. He was about an arm's length from Brady.

Muszel testified that the Respondent "screamed out a police code, Code 53," he believed. He did not know what that meant, but "it was enough for the Lieutenant to drive away."

Muszel charged that the incident escalated, and that once Brady drove off, the Respondent "felt more powerful" and got louder.

Three of Muszel's friends – [redacted] – arrived after they called Henry, Surry or Muszel. All of them had been watching a boxing match together, and they were supposed to meet up. Muszel stated that at least some of his group, "probably" at least, were "going out" after the boxing match, but he did not recall where. Muszel's group told the three others that they had been in a car accident and to meet them at the scene. Muszel admitted that he had between a half and a whole drink of Hennessy before leaving.

Muszel asserted that all six of his group were inspecting the damage to Henry's car. The Respondent kept approaching. He was "loud, arrogant . . . cursing" and repeatedly said, "You don't know who you're effin with. You don't know who you're talking about."

Muszel stated that a second police car pulled up. He contended that "the Code 53 was used again, and that car sped off."

Muszel believed that the Respondent was a uniformed member of the Department based on his use of Code 53 and the fact that the two police vehicles had arrived and left. Each time the police left, Muszel believed, the Respondent became more aggressive. Muszel testified, however, that he did not know if the members in the police vehicles knew that the Respondent was an officer.

Then, Muszel claimed, "things got out of hand." He asserted that the Respondent said, "I will kill you," and repeated, "You don't know who you're fucking with." Muszel's group responded, "Go to your side, go to your side." Muszel testified that

Surry approached the Respondent, "hands up, open palm," and asked the Respondent to relax. Muszel told the Respondent, "As a matter of fact, we have friends, family on the job. When Surry put his hand up in a defensive motion, while asking the Respondent to stop, the Respondent "got defensive and started swinging his closed fist" on Surry.

Muszel testified that the Respondent, who was balancing himself on the curb, fell down. Muszel observed a black handgun in the Respondent's hand. He stated, "Back the fuck up, back the fuck up. I'll kill all of you." The Respondent was waving the gun in a loose, unsteady, unfocused manner. Originally, the Respondent "focused" the gun on Surry, "and it made its way to everybody else who was there," except Henry, who was across the street. Muszel was terrified when the Respondent produced the gun. He may have called 911 again after the Respondent pulled out the weapon.

Muszel testified that he did not observe the Respondent with a cell phone. He did not know if anyone brought a Hennessy bottle to the scene. Muszel, when asked whether he punched or kicked the Respondent, professed, "There was no contact by any of us with" the Respondent.

Muszel testified that Brady arrived again "moments" after the Respondent produced the gun.

The Respondent never identified himself as a Police Officer. Later, while "we were detained at the precinct, we found out, because there was a lot of talk" that the Respondent was waiting for his Patrolmen's Benevolent Association representative. Muszel's group also noticed the "freedom he had inside the precinct, to roam around the precinct." Muszel also made the conclusion based on the Respondent's possession of the gun.

At the precinct, Brady acknowledged to Muszel that the Respondent was "clearly intoxicated." Muszel asked Brady why he left the scene, noting, "We would have avoided this, if he just stopped the car." Brady answered that he had another call to respond to. Muszel saw this as odd because Brady's "lights weren't on, he made a slow right turn. It seemed like he had nowhere to go."

Muszel stated that he was questioned by IAB, but denied knowing that IAB investigates police misconduct. He maintained that he was unaware of IAB's purpose in questioning him about what happened with the Respondent.

Muszel admitted that he was a plaintiff in a civil action for damages against the City in connection with the incident. His lawsuit was predicated on "[t]he whole ordeal." Muszel stated that he was "detained" for 12 ½ hours. "Nearly every cop," he asserted, told his group they could not leave the stationhouse. When they asked Brady if they could leave, he said they had to wait for IAB. Muszel conceded that he was not handcuffed to a bench, and was allowed to use the bathroom.

Lieutenant William Brady

Brady, the midnight Platoon Commander at the 102 Precinct, was on duty on the morning of December 4, 2005, at approximately 12:30 a.m. in the area of Lefferts Boulevard and Metropolitan Avenue, Queens County. Rojas was his Operator. At approximately 12:15 a.m., Brady was canvassing for a robbery perpetrator along with the assigned sector. About fifteen minutes later, Brady made a right turn from Metropolitan Avenue onto Lefferts, going south. In that area, Brady stated, both Lefferts Boulevard and Metropolitan Avenue have one lane in each direction.

Approximately 130 feet from the intersection, Brady encountered a group of people standing in the middle of the street, apparently arguing. One party included Henry, who was driving, Surry and Muszel. The Respondent was the other party.[3] There had been an accident, with property damage only. There was, Brady believed, damage to the Respondent's front side fender, and to the rear passenger side of Henry's car.

The parties were having a "minor" argument over who had crossed the double yellow line. The Respondent, "speaking out loud in the street," apparently at Henry's group, said "What they call this is a 53," the code for a vehicle accident.

Concerned about safety due to the rainy wetness of the pavement and lack of good lighting, Brady told Henry's party to stay on the east side of the street, and told the Respondent to stay on the west. Brady asserted that Henry's group complied, but that he had to tell the Respondent several times. The Respondent kept "arguing . . . what are you going to do about my phone?," stating that the other party broke his phone, but not specifically, "They took my phone."

Brady asserted that the Respondent was too incoherent for Brady to ascertain whether a robbery or larceny of the phone had occurred. Brady claimed that incoherence could be caused by several different factors. Brady detected a strong odor of alcohol on the Respondent's breath, but not watery and bloodshot eyes or slurred speech. He was not focused at that time on determining the Respondent's state of intoxication.

Brady told the Respondent to get out of the street for his own safety, that he was handling a robbery, and that a sector would be arriving. Finally the Respondent complied. Brady left and continued the canvass. He also requested that a sector respond

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[3] Brady did not identify the Respondent in the Trial Room, but referred to him without objection as Darryl White.

to the scene for a vehicle accident with property damage, plus a related criminal mischief report.

Brady admitted that he considered the Respondent's mention of Code 53 to be police jargon. He did not, however, deem the Respondent's usage unusual because many people, such as police buffs, individuals with scanners, or television watchers, could recognize that language. The Respondent's use of the phrase did not raise his suspicion that he was "affiliated" with the Department. Brady believed that his use of the term "sector" would allow the Respondent to "know someone is responding to take his report . . . that is common sense."

Brady returned to the scene three to five minutes later, "when the second call came over" indicating a man with a gun. It took him about a minute to get there. Police Officer Ferguson was standing with the Respondent. Henry's group, which now included, Brady believed, six individuals altogether, was standing on the east side of the road, where Brady had asked them to wait. They told Brady that the Respondent pointed a gun at them. "There were people yelling" that the Respondent was drunk. Brady also testified, however, that this group was "quiet."

Brady testified that the Respondent appeared intoxicated; he had a heavy odor of alcohol on his breath, slurred speech, and bloodshot, watery eyes. He did not appear disheveled. Brady asked the Respondent if he had a gun, and the Respondent replied affirmatively, displaying a holstered firearm on his right side, under a tuxedo jacket.

When Brady asked why the Respondent had a weapon, the Respondent said, "I'm on the job." However, Brady also indicated that the Respondent said this initially when Brady walked over to him.

Brady removed the Respondent's firearm, which he believed was a Glock, and it was safeguarded. Brady testified that he did not notice the Respondent's holster and weapon the first time he was at the scene, commenting that his jacket obscured it.

Brady contended that he tried to find out what happened from the Respondent, but "was getting answers that weren't relevant to my questions, harping completely on this cell phone, 'What are you going to do about my phone?'" When Brady inquired if the Respondent was drinking, he answered, Brady believed, "I have eighteen years on the job. Are you going to take their word over mine?" Brady informed the Respondent that they would have to go back to the precinct, and that the Duty Captain would have to get involved because it was an off-duty incident. The Respondent commented, "Can we forget about the whole thing? Let me go home and go to sleep, and I will fix my own car."

Brady contended that the Respondent did not, during his first visit to the scene, identify himself as a member of the Department. Brady stated that he left the first time because robbery was a higher priority than an accident with property damage.

Both Henry and the Respondent were taken to the precinct. Brady and Ferguson went as well. Brady let the Respondent sit in the 124 Room, and a delegate from the PBA spoke to him. Several other delegates also responded. A delegate, whom Brady believed was Police Officer Dennis of the 23 Precinct, fingerprinted the Respondent. Brady was informed that it was standard procedure for a delegate to do the fingerprinting as a courtesy to the Department member.

Brady testified that when the Respondent emptied his pockets to inventory his possessions, Brady found a bottle of Clear Eyes, which removes redness from the eyes.

The Respondent told Brady that he gets 4.5 on his evaluations, that his reputation was impeccable, and he was beyond reproach.

Brady testified that there was an allegation that the Respondent punched one of the members of Henry's group and pulled out his firearm. Brady spoke with Surry about the "assault" and his injuries. Brady spoke to Henry also, and noticed alcohol on his breath. Henry's group was waiting to be interviewed by IAB.

Brady testified that he notified the Duty Captain, Winslow, and that IAB "was notified." Both Henry and the Respondent were arrested.

Brady denied that he was investigated for failure to take proper police action. He testified that he was "named" in a pending lawsuit concerning Henry's arrest.

Sergeant Roger Coleman

Coleman, the day tour Patrol Supervisor in Transit District 1, was previously assigned to IAB Group 10 as an investigator. He was assigned the Respondent's case. Coleman reviewed paperwork and interviewed witnesses.

Coleman testified that on the night of the incident, December 4th, IAB investigators were dispatched to the 102 Precinct. Coleman spoke with a member of the Queens District Attorney's Office Corruption Unit. He also requested 911 and radio transmissions.

Four 911 calls were introduced into evidence (see DX-2, 911 calls). The first call is from the Respondent; the second and third calls are from independent witnesses; and the fourth call is from Muszel.

Coleman also spoke with Henry, Surry and Muszel. That interview took place at the District Attorney's Office. Coleman interviewed the Respondent as well.

Coleman reviewed interviews of independent witnesses, but they did not wish to cooperate further. One of the independent witnesses was [redacted] told Detective Fitapelli that he observed the aftermath of the car accident. [redacted] told Fitapelli that Henry, whom he identified and characterized as an "extremely large" male black, approached the Respondent and took off his leather jacket "so he can fight in an aggressive manner." [redacted] spoke of three people from a van against one male in a suit from a Maxima. [redacted] said that the three people in the van surrounded the person from the Maxima, and there was no doubt in [redacted]'s mind that the latter "was being forced to fight." [redacted] added that the person from the Maxima "was circled around, like animals do, when they surround their prey." [redacted] observed the person from the Maxima fighting one of the people from the van. [redacted] could "see it was bad talk at this point," and he observed the person from the Maxima take out a gun from behind his back. According to [redacted], there was no question that the van individuals "were looking for a fight," and that the other person was defending himself.

Coleman testified that another male independent witness, [redacted], was also interviewed [redacted], United Parcel Service driver, viewed the incident from his window. [redacted] reported a car accident to 911, and stated that there was a man with a gun, wearing a tuxedo.

The Respondent called 911 as well (see DX-2, call no. 1). The Respondent gave the operator the location, and asked for "a cab," but corrected himself quickly and

requested "the cops." There were people laughing and screaming in the background, and the call ended abruptly.

At his Official Department Interview, the Respondent stated that when he called 911, Henry snatched the phone out of his hand and threw it to the ground. Coleman testified that investigators from the District Attorney's Office found the Respondent's cell phone, broken in pieces, near the accident scene. The phone appeared to have been thrown on the ground very hard, run over, stepped on, or something like that. A Hennessy bottle was also found close to the accident, in brush or by the side of the road.

Coleman stated that the Respondent was suspended in connection with the accident, and pleaded guilty in criminal court to driving while impaired. Coleman also concluded, based on his investigation, that the Respondent was unfit for duty while armed.

The Respondent's Case

The Respondent testified in his own behalf.

The Respondent

The Respondent, who became a Police Officer in June 1996, had been assigned in the 23 Precinct the entirety of his career. He was currently the assistant to the Intelligence Officer. He also had experience as an anticrime officer. The Respondent stated he was 6'1" in height and weighed 200 pounds on December 4, 2005.

On the evening of December 3, 2005, the Respondent said, he attended a general meeting at his Masonic Lodge on Clermont Street in Clinton Hill, Brooklyn. He was

there from 6:00 to 9:00 p.m. Afterward, he attended a dinner held by his sister chapter. The dinner ended at midnight. Throughout the evening, the Respondent drank three 6-ounce cups of cognac and cola with ice. After the event, the Respondent took Atlantic Avenue and the Jackie Robinson (Interborough) Parkway to Metropolitan Avenue.

First, the Respondent testified, he dropped off a lodge brother at the home of the lodge brother's sister. The sister and the Respondent both lived in the Kew Gardens area. Then, the Respondent headed home. The Respondent denied that the roads were wet that night, or that it was raining.

The Respondent testified that from eastbound Metropolitan Avenue, he made a right turn onto Lefferts Boulevard. He described Lefferts as a narrow (approximately 30 feet), winding road at that location, with a double yellow line.

The Respondent believed a sports utility vehicle, proceeding north and approaching the corner of Lefferts and Metropolitan, was attempting to avoid an illegally-parked vehicle and crossed the double yellow line. That car and the Respondent's "had a side swipe." The Respondent maintained that he was on his side of the road. The accident damaged the Respondent's driver side front-quarter panel, and punctured a tire. The Respondent took down the license plate of the other vehicle.

Both vehicles stopped on their respective sides of the street. The Respondent asserted that his vehicle became unlevel due to the damage from the accident, and he lost his balance while getting out of the car, but did not fall.

The Respondent testified that he had his cell phone and Department shield and identification with him. His black 9-millimeter Glock pistol was positioned in a

regulation holster on his right hip. He was wearing a black DKNY suit, not a tuxedo, with a white shirt and black Masonic bow tie. He was not wearing an overcoat.

The Respondent contended that the door of the other vehicle opened "abruptly," and Henry, who stood approximately 6'3" and weighed 260 to 300 pounds, emerged. He believed Henry removed his coat as he got out of the car. The Respondent claimed that Henry approached "very rapidly in a boisterous, belligerent, profanity-laced manner," and stated, in sum and substance, "[W]hat the fuck is your problem?"

Based on Henry's actions, the Respondent determined "that the situation had the potential to become volatile," and that "a confrontation was imminent," due to Henry's abrupt opening of the car door, belligerence, and profanity. The Respondent testified that he called 911, but Henry "snapped" the phone out of his hand and threw it over his head.

The Respondent testified that he stepped back and adopted a defensive posture. He "bladed" himself, by placing his right foot behind him and placing his shoulders forward. The Respondent testified that Surry punched him from the left side, hitting his face, and he fell. When he got up, Surry punched him again. This time, the Respondent said, he hit Surry back. The Respondent saw another person, and took another defensive stance.

The Respondent testified that he observed an RMP traveling south on Lefferts Boulevard, and he flagged it down. He saw that the Operator was a Police Officer, and that the passenger was Lieutenant Brady. The Respondent said, "How are you doing, Lieu. I was involved in a 53, I was subsequently punched, and I had my cell phone snatched out of my hand." The Respondent contended that Brady looked him up and down, and instructed him to get back in his vehicle and wait for a sector.

The Respondent repeated himself, as did Brady, and Brady drove away. The Respondent denied that Brady exited the car, or that Brady told him to step out of the roadway. In the Respondent's mind, Brady's use of "sector" indicated "that I had a knowledge in, background in, law enforcement."

The Respondent maintained that he did not identify himself as "involved" with the Department because he was concerned about his personal information being divulged to the people with whom he had the confrontation. He did not feel that identifying himself at the outset would have defused the situation because his personal information would have been communicated. The Respondent claimed that while the others would have become privy to his information in an eventual accident report, they would not have known he was a Police Officer.

The Respondent testified that he noticed three additional people at the scene. He walked toward a payphone booth to call 911, and report "an 85, Police Officer needs assistance." The Respondent claimed that the six men surrounded him, and one of them uttered, "The cops are not there now motherfucker. What are you going to do?"

The Respondent asserted that based on the totality of the circumstances, including his cell phone being "forcibly removed," getting punched, and "abandoned by" Brady, "[l]ife preservation was paramount at that time. He removed his handgun, keeping it pressed against his right hip and upper thigh, and stepped back. He admitted that there was no specific threat of physical force from Henry, Surry or Muszel.

The Respondent testified that someone remarked, "You must be a cop." The Respondent answered, "That's right, I'm a cop. Step back." One of the men called 911, and the Respondent returned to his vehicle and waited for the police.

A couple of minutes later, Ferguson arrived. Ferguson asked the Respondent if he was a Police Officer, and the Respondent replied affirmatively. Ferguson did not request his identification or weapon. Ferguson said to the Respondent, "I smell a little alcohol." The Respondent acknowledged that he had "a couple of drinks." Ferguson responded, "You look good, sound fine, but I advise you to maintain your composure, because Lieutenant Brady is not your friend." The Respondent believed Ferguson's partner was interviewing a woman and her son.

The Respondent testified that Brady arrived and spoke to Henry's group for about ten minutes. Brady then came over to the Respondent and "got about a foot in front of me." Brady did not remove anything from the Respondent. He returned to the other side of the street. Brady came back to the Respondent once more, and asked for his weapon. The Respondent gave it to him, and Brady went again to the other side of the street.

The Respondent testified that Brady returned again to the Respondent, ordered Ferguson to handcuff him, and told the Respondent he was under arrest. The Respondent asserted that Ferguson appeared "perplexed," and said "What?" Brady repeated his direction.

Ferguson did not handcuff the Respondent, but allowed him to sit in back of the RMP. The Respondent was taken to the 102 Precinct. There, he met with Police Officer Joe Dennis, his union delegate. The Respondent contended that Dennis advised him not to submit to any breathalyzer or coordination test. The Respondent claimed he protested, but followed Dennis's advice. The Respondent asserted that he "basically had to fingerprint myself" because Dennis was not proficient with the Live Scan machine. The Respondent did not recall possessing Clear Eyes solution that night.

The Respondent was charged with driving while intoxicated, menacing and harassment. He was released on recognizance at arraignment, and in March 2006 pleaded guilty to the Vehicle and Traffic Law infraction of driving while impaired. The other charges were dismissed, and he paid a $300 fine.

The Respondent admitted that he was unfit for duty. He denied, however, that he was intoxicated and "unable to understand what tactics you needed to protect yourself from any type of physical harm." The Respondent stated that he was in a position to return to his vehicle, but that this would have been a tactical disadvantage and not a safe avenue of retreat. When the six individuals surrounded him in a semicircle, the Respondent asserted, a fence was at his back, and he had no way of retreating.

FINDINGS AND ANALYSIS

Specification Nos. 6 & 7

The Respondent is charged in the sixth specification with publicly entering into a verbal and physical altercation, which escalated into a police incident, with Aaron Surry. He is charged in the seventh specification with "displaying" his weapon, causing Henry, Surry and Muszel "to feel intimidated and/or threatened." The Court finds the Respondent Not Guilty of both specifications.

Although Specifications 6 and 7 do not reference a criminal offense, the Penal Law defense of justification is instructive. The specifications appear to charge the Respondent's punch of Surry and the display of the Respondent's weapon to Henry, Surry and Muszel. However, a person may use physical force against another when he reasonably believes it necessary to defend himself from unlawful physical force by that

other person. See Penal Law § 35.15 (1). Deadly physical force may only be used if deadly physical force is threatened. See Penal Law § 35.15 (2).

People v. Ellis, 233 A.D.2d 692 (3d Dept. 1996), provides a good parallel to the instant matter in the sense that it demonstrates that a justification defense would have been available to the Respondent had he been charged criminally with menacing. In Ellis, three men approached the defendant after he talked to the female companion of one of them. They "yelled in his face" and threatened to beat him up. The defendant repeatedly told them to leave him alone as he did not want any trouble; but after the yelling and threats continued, the defendant pulled out a knife and swung it back and forth in attempt to keep the others away. He "wasn't trying to cut anyone at that time." The three men backed away, but tried to surround the defendant from behind as he walked away. The Third Department ruled that the defendant was entitled to a justification instruction on the menacing charge. Ellis, 233 A.D.2d at 692. In other words, the defendant should have been allowed to argue to the trier of fact that he was justified. For the reasons that follow, the Court finds that the Respondent was faced with much the same circumstances as the defendant in Ellis.

First, the defense of justification does not apply if the defendant is the initial aggressor. See Penal Law § 35.15 (1)(b). The Court credits the testimony of the Respondent, and discredits the testimony of Henry, Surry and Muszel, to the extent that it finds the Respondent was not the initial aggressor, and that the altercation was the fault of the three complainants. While Henry, Surry and Muszel testified on direct examination in a relatively straightforward manner, on cross-examination their testimony was replete with I-don't-remembers and I-have-no-ideas, even on questions that could be answered

with an estimate, like the width of a street or the time spent driving. In contrast, the Respondent mostly testified in a matter-of-fact fashion while simultaneously confessing to various forms of misconduct.

All four parties were drinking. Even the Department's witnesses, however, betrayed at times that the altercation was begun by the complainants, not the Respondent. Henry admitted that he was "very upset." Muszel stated that Henry "asked" the Respondent "out of the car" and said, "What are you, drunk?" It is more likely than not that Henry's "request" was made belligerently and set the tone for future events.

The Respondent's 911 call (the first call on DX-2, which contains four 911 calls) dramatically demonstrates the contrast in the attitudes of the party toward the beginning of the confrontation. The Respondent calmly, albeit drunkenly, requests police assistance. Before he can say why, a loud scream is heard, followed by laughter. It is not, as Muszel suggested, "nervous" laughter, but rather the laughter of several individuals ganging up on one person. The call also confirms the Respondent's account that his cell phone was snatched from his hand, probably at the moment the scream is heard.

The Court also notes the account of [redacted] Although he did not testify, his hearsay account is reliable because of its specificity, the fact that he is an independent, uninterested witness, and the laudable nature of his response to the investigators' canvass for witnesses. [redacted] described the instigators as Henry's group, and he unequivocally stated that the Respondent was forced to fight and was defending himself, even noting that the Respondent was circled by his antagonists like animals attacking their prey.

Also important is Muszel's 911 call. Muszel called 911 after the Respondent pulled out the weapon. This supports the Respondent's account that after displaying his gun, he walked back to his car and waited for police, and that while he did so, Muszel, was able to call 911. The second 911 caller, an independent witness, also states that the Respondent, after having the gun in his hand, walks back to the vehicle.[4] This would support the Respondent's assertion that he was not affirmatively confrontational during the encounter, and was reacting to provocation from Henry, Surry and Muszel.

It is also notable that Henry, Surry and Muszel all describe the Respondent as belligerent more or less from the outset, then punching Surry, then pulling out his pistol immediately thereafter. Essentially, the Respondent was portrayed as punching Surry, then without a further intervening event, much less a provocative one, removing his weapon. This does not make very much sense. It is more likely that, as the Respondent testified, Surry and the Respondent first struck each other, and then, when the Respondent was surrounded by the three, took out his weapon.

For these reasons, the Respondent is found Not Guilty of Specification Number 6. The "verbal and physical confrontation" with "an individual" – Surry – was not the fault of the Respondent; it was the fault of Henry, Surry and Muszel. The Respondent only punched Surry after Surry punched him twice. The Respondent should not be subject to discipline for being the victim.

Similarly, the Respondent is found Not Guilty of Specification Number 7. If the display of his gun caused Henry, Surry and Muszel "to feel intimidated and/or threatened," the fact remains that they were the main aggressors in this situation. The Respondent should not be subject to discipline in circumstances where, after being

[4] Based on Coleman's testimony, this caller is most likely [redacted]

surrounded in a semicircle by three persons, one of whom had already punched him, decided to display his gun in a bid to get them to back off. Rather, it was Henry, Surry and Muszel who intimidated and/or threatened the Respondent.

Specification No. 8

The final specification deals less with the Respondent's actions toward Henry, Surry and Muszel, and is more about the alleged violation of rules specific to the operation of the Department. Specifically, it concerns the propriety of his actions as a member of the Department while armed. The Respondent is accused of acting prejudicially to the good order, efficiency or discipline of the Department by being unfit for duty while armed, and displaying his weapon to Henry, Surry and Muszel. The Court finds him Guilty.

The Respondent pleaded Guilty and testified in mitigation to Specification Number 5, which charges solely being unfit for duty while armed. It is not disputed that he "display[ed]" his weapon to Henry's group. It follows that as a matter of the Patrol Guide, this display was misconduct.

Being unfit for duty as a result of intoxication, while armed, is an offense serious enough to warrant termination in some circumstances, see *Patrol Guide* § 203-04, Fitness for Duty, Additional Data, para. 2. Members of the Department are emphatically instructed not to be in possession of their firearms if there is any chance they will become unfit as a result of consuming intoxicants, see *Patrol Guide* § 203-04, Additional Data, para. 1. This is directed at situations exactly like that the Respondent found himself in. It is likely that the Respondent knew he might be drinking when he went to his lodge meeting and dinner. He should have secured his firearm beforehand. While, as noted

supra, the Respondent should not be held to answer here for Henry's group's aggression toward him, he is responsible for violating Department policy: do not become unfit for duty by getting drunk, and perhaps more importantly, do not possess your firearm in an inebriated state.

The Respondent's display of his firearm makes his violation of the unfit-while-armed rule even more egregious. He had every right to defend himself against the onslaught from Henry, Surry and Muszel, but that does not change the fact that the removal of his firearm from the holster and display of it to Henry's group was misconduct. The Patrol Guide rule against being unfit for duty while armed exists for reasons completely separate from a member's right to defend himself if he gets into a fight. The dangers of a drunk person holding a gun are obvious. Additionally, with the Respondent's judgment impaired by alcohol, someone from Henry's group could have snatched the gun from him as they did his cell phone. While the Court recognizes that the Respondent was in a very difficult situation, the fact remains that he should not have been armed in the first place.

Additionally, it is unlikely that the Respondent kept his gun tightly against his side, as he testified, while displaying it. The second 911 caller, who watched the incident from his residence, provided the longest and most detailed account to 911. He stated three times that he saw the firearm "in his hand." The caller is very nervous, as is a woman in the background (probably his wife or girlfriend). His concern is focused on the man with the gun, and he wants the 911 operator to let the responding members of the Department know that man is armed. He repeatedly implores the operator to "tell the cops" this. It is clear from his account that he is worried that the gun might be used.

Moreover, the third 911 caller, who seems to be an independent witness to the events, stated that the Respondent was waving and pointing the gun.

The Respondent is not liable here for punching Surry, because Surry first punched him twice, and the Respondent justifiably responded with a punch of his own (Specification 6). He is not responsible for "intimidating and/or threatening" his three assailants, *each* of whom was bigger than him and who surrounded him in preparation for further violence (Specification 7). The Respondent is, however, subject to discipline for compounding his being unfit while armed with unholstering and displaying his firearm during a very volatile situation that could have easily turned out much worse than it did. The Court notes that the Respondent was unable during his 911 call to properly enunciate his words to the operator. He must have also been unable to exercise the meticulous judgment needed while in possession of a firearm. As such, he is Guilty of Specification Number 8.

PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222, 240 (1974). The Respondent was appointed to the Department on July 18, 1996. Information from his personnel folder that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Respondent has been found Guilty in Specifications 1 through 5 of being unfit for duty while armed due to the consumption of intoxicants, as well as refusing to submit to a breathalyzer test after being arrested. He has also been found Guilty in

Specification 8 of displaying his firearm during the incident. The Court notes that this specification charged only that the Respondent "displayed" his weapon, not that he pointed it at anyone or waved it around. Therefore, in consideration of a penalty, the Court deems the Respondent only to have displayed the firearm.

On summation, the Department requested, as a penalty, the forfeiture of 30 days already served on suspension, 15 days of vacation, one year of dismissal probation, and compliance with ordered breathalyzer testing and counseling.

The Department's recommendation is within the range of similar cases. See, e.g., Disciplinary Case No. 80551/05 (11-year member with no prior disciplinary record forfeited 21 suspension days already served and 9 vacation days, and received dismissal probation, breathalyzer testing, and counseling, for being unfit for duty and driving while intoxicated after minor accident; member was armed and refused to take breathalyzer); Disciplinary Case No. 76419/00 (6-year member with no prior disciplinary record forfeited 18 suspension days, 45 vacation days, and received one year dismissal probation for being unfit for duty due to alcohol, being loud, vulgar, and irate in a Department stationhouse, and refusing to comply with lawful order to disclose location of his firearm; the Respondent, who had been drinking at his bachelor party, was uncooperative after his arrest for disorderly conduct, harassment, obstructing governmental administration, and resisting arrest).

The Court has taken into account the Respondent's service record. Also considered is the Department's forceful policy against drinking and driving. The Court finds sensible the Department's suggestion here that the Respondent be ordered to submit to breathalyzer testing. See also *Patrol Guide* § 203-04, Interim Order 9 (2), Department

Policy Statement Concerning the Operation of a Motor Vehicle While Under the Influence of Alcohol [negotiated plea for a uniformed member determined to have been driving while unfit due to alcoholic intoxication must include dismissal probation and the submission by the member to ordered breathalyzer testing during probation]).

Under the totality of the circumstances, the Department's recommendation is just. The Court therefore recommends that the Respondent be DISMISSED from the New York City Police Department, but that his dismissal be held in abeyance for a period of one year, pursuant to Section 14-115 (d) of the Administrative Code of the City of New York, during which time he is to remain on the force at the Police Commissioner's discretion and may be terminated at any time without further proceedings. The Court further recommends that the Respondent forfeit 30 days already served while on suspension, and 15 vacation days.

Respectfully submitted,

David S. Weisel
Assistant Deputy Commissioner – Trials